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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF ENFORCEMENT

MEMORANDUM

SUBJECT: Contingency Plan for FGD Systems During Downtime
as a Function of PSD

FROM: Director, Division of Stationary Source Enforcement

TO: G.T. Helms, P.E. Deputy Director
Air and Hazardous Materials Division

This is in response to your request dated November 9, 1977, asking whether PSD approvals for new sources using FGD systems can be conditioned to require a contingency plan for periods when the FGD system is not functioning.

PSD and SIP regulations require the establishment of emission limitations which will be sufficient to ensure non-degradation of air quality and attainment and maintenance of NAAQS, respectively. In order to assure this at all times it is necessary for the source owner or operator to be in compliance with all emission limitations at all times. For this reason, the Agency in the April 27, 1977 F.R. (42 FR 21472) promulgated a requirement outlining our position on SIP malfunctions. In the preamble to those requirements it is stated, ". . .the Administrator has determined that the automatic granting of a regulatory exemption (permit in this case) for these periods of excess emissions is not a suitable remedy." From this language, therefore, it would not be wise to include within the PSD permit a specific exemption from the requirements during periods of "upset" or "malfunction."

We do, however recognize that some relief should be afforded during certain upset situations. If the source were allowed an automatic exemption it would encourage the source to claim, after every period of excess emissions, that an exemption is warranted. Therefore, the only enforceable means available to the Agency in dealing with all emission excursions-be they potentially due to malfunctions or otherwise-is to issue notices of violations with the source being given an opportunity to prove that the violation was due to an unavoidable situation of upset or malfunction.

In response to the particular items raised in your memo, I would not recommend specifically addressing the system by-pass. That is, if a source elected to have a by-pass capability it could do so, however it would in no way limit our abilities to enforce the emission limits during those periods when the emissions were not routed through the control device. We would then exercise our enforcement options to address the sources failure to satisfy the prescribed emission limit.

While I would not recommend requiring a malfunction contingency plan, I would alert the source that any inability on their part to maintain their emissions consistent with the applicable regulation may result in an enforcement action initiated by EPA. This would apply to requirements necessary to attain and maintain the NAAQS as well as PSD.

To facilitate this enforcement approach it will require the issuance of a Notice of Violation (NOV), although this will not be necessary for NSPS or NESHAPS, for every period of excess emission ascertained by your Office. After issuance of the NOV the Region should consider any information developed by the source which more fully explains the circumstances of the violation and any good faith efforts of the owner or operator of the source to comply and in determining whether further Agency action is appropriate.

If you have any further questions or comments, please contact Rich Biondi (755-2564) of my staff.

Edward E. Reich

cc: Dick Rhoads, CPDD
Mike Trutna, CPDD